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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of:

Further Forbearance From  
Title II Regulation of Certain  
Types of Commercial Mobile  
Radio Service Providers

GN Docket No. 94-33

COMMENTS OF IN-FLIGHT PHONE CORPORATION

In-Flight Phone Corp., a licensee in the 800 MHz Air-Ground Radiotelephone Service, urges the Commission in these comments to exempt licensees in this Service from mandatory compliance with TOCSIA<sup>1/</sup> and with the tariffing and facilities authorization requirements that are applicable when offering international services.<sup>2/</sup>

<sup>1/</sup> TOCSIA, the Telephone Operator Consumer Services Improvement Act, is codified at Section 226 of the Communications Act. While In-Flight believes TOCSIA, by its terms, is inapplicable to Air-Ground licensees, the Common Carrier Bureau has ruled otherwise. Declaratory Ruling, DA 93-1022 (rel. Aug. 27, 1993). However, a petition for reconsideration of that ruling is before the Commission. See "Pet. for Recon. or Waiver" by GTE Service Corp. (MSD-92-14, Sept. 27, 1993). The Commission may exempt Air-Ground licensees from TOCSIA either by reversing the Bureau's ruling that TOCSIA is applicable to Air-Ground licensees or by exempting Air-Ground licensees from mandatory compliance by means of a waiver granted on the basis of the record in the present proceeding.

<sup>2/</sup> Section 203 of the Communications Act ("Act") requires a tariff in providing any international communications service, and Sections 204 and 205 aid in the enforcement of Section 203. Section 214 of the Act requires the FCC to approve the deployment of certain facilities necessary to provide an international service.

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### Background

The Commission seeks comments in this proceeding on whether to exempt particular classes of commercial mobile radio service (CMRS") from provisions of the Act beyond those from which all CMRS providers were exempted by the Second Report and Order in Docket No. 93-252.<sup>3/</sup> In that order, the agency relieved all CMRS providers from mandatory compliance with several sections of the Act. But it declined to exempt any CMRS provider from TOCSIA and from tariffing and facilities authorization obligations that are applicable when providing international communications service. The only justification offered by the FCC for not exempting CMRS providers from TOCSIA was its statement that "[n]o commenter has demonstrated how forbearing from applying . . . TOCSIA to CMRS providers . . . would be consistent with the public interest."<sup>4/</sup> The agency offered no explanation at all for why it did not exempt CMRS providers from tariffing and facilities authorization requirements for the provision of international services.

Apparently recognizing that it should exempt certain categories of CMRS providers from additional regulatory requirements imposed by the Act, the Commission issued the present Notice only a few weeks after releasing the Second Report and Order in Docket 93-252. In this Notice, the agency stated that it might be appropriate to exempt particular categories of CMRS providers

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<sup>3/</sup> Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd. 1411 (1994).

<sup>4/</sup> Id. at 1490.

from additional sections of the Act, and it asked those desiring such exemptions to show in their comments why forbearance is justified under Section 332(c)(1)(A) of the Act.<sup>5/</sup> That section authorizes the Commission to forebear from enforcing a provision in Title II of the Act against a CMRS service if

- enforcement is unnecessary "to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable";
- enforcement "is not necessary for the protection of consumers"; and
- waiving enforcement "is consistent with the public interest".

In order to decide whether exempting a particular class of CMRS providers from an additional section of the Act is "consistent with the public interest," the agency stated that it would consider whether "the costs of compliance with . . . [the subject provision] outweigh the benefits".<sup>6/</sup>

#### Discussion

#### I. Air-Ground Licensees Should Be Relieved of the Obligation to Comply with TOCSIA

The Commission should exempt Air-Ground licensees from the obligation to comply with TOCSIA because each of the three conditions necessary to justify an exemption under Section 332(c) plainly exists.

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<sup>5/</sup> Notice at ¶ 4.

<sup>6/</sup> Notice at ¶ 5.

First, enforcement of TOCSIA is unnecessary to ensure reasonable "charges, practices, classifications, or regulations" for Air-Ground service for two reasons. First, the Commission has held that Air-Ground licensees face substantial competition<sup>7/</sup> and has recognized that airlines themselves have an independent competitive interest in ensuring that Air-Ground service is provided on reasonable terms and conditions.<sup>8/</sup> A participant in a fully competitive industry has no incentive to adopt unreasonable charges, practices, classifications, or regulations.

Second, enforcement of TOCSIA against Air-Ground licensees is not necessary "for the protection of consumers." The Senate Report accompanying TOCSIA explained that TOCSIA's purpose is to solve four kinds of complaints that had been made to the FCC by consumers making calls from phones in public places, as follows: (1) the cost of making such calls often was "several times higher than the prices charged by AT&T"; (2) service providers often did "not identify themselves to the caller before they connect to the call"; (3) service providers often "billed for calls that are never answered"; and (4) callers often could not access their preferred long distance carrier "because the carrier-specific access code

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<sup>7/</sup> Report and Order in GEN Dkt. No. 88-96, 5 FCC Rcd. 3861, 3865 (1990), recon. denied, 6 FCC Rcd. 4582 (1991). Three Air-Ground licensees provide service over their own, independently owned nationwide Air-Ground networks. They are GTE Airfone, Inc.; Claircom Communications Group, L.P.; and In-Flight.

<sup>8/</sup> Id.

[was] blocked".<sup>9/</sup> To In-Flight's knowledge, no aircraft passenger using the Air-Ground service of any Air-Ground licensee ever has complained to the FCC about any of these matters.

Moreover, any complaints against In-Flight concerning any of these four matters would be unjustified. In-Flight charges less than AT&T for Air-Ground calls, not "several times more".<sup>10/</sup> In-Flight fully identifies itself as the provider of service (on both a video screen and a seatback pocket card directly in front of each passenger) rather than hiding this fact. In-Flight does not bill for uncompleted calls.<sup>11/</sup> In-Flight does not block carrier access codes. However, callers rarely (if ever) seek to access specific terrestrial carriers by dialing these codes because airline passengers perceive Air-Ground service as an end-to-end communications service rather than as an access service. No

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<sup>9/</sup> S. Rep. No. 439, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1577, 1579.

<sup>10/</sup> For example, In-Flight charges \$4.00 for a two minute interstate call. See In-Flight Tariff FCC No. 1, § 5.1.1. AT&T, by contrast, charges \$6.00 for an interstate call of the same duration. AT&T Tariff FCC No. 1, § 3.2.16.E.2. Congress obviously was not concerned in enacting TOCSIA about complaints of price differences between AT&T Air-Ground calls and similar calls offered by other Air-Ground providers because AT&T did not begin providing Air-Ground service until several years after TOCSIA was enacted. Even today, AT&T participates in the Air-Ground market only as a reseller of Claircom service rather than as a facilities-based carrier.

<sup>11/</sup> See In-Flight Tariff FCC No. 1, § 2.6.4(c). In-Flight also has a very liberal refund policy for any caller who is not satisfied with the In-Flight Air-Ground service.

airline passenger has ever informed In-Flight of his or her desire to access the terrestrial carrier of its choice.

Finally, exempting Air-Ground licensees from mandatory compliance with TOCSIA also is "consistent with the public interest" because the costs that Air-Ground licensees would incur to comply with TOCSIA are substantially greater than the benefits. Not only are the costs unjustified due to the absence of need as discussed above, certain costs are unjustified for other reasons as well. If enforced, for example, TOCSIA would require an Air-Ground licensee to subscribe to an "800" or "950" telephone number.<sup>12/</sup> The purpose of this requirement is to give callers the ability to access that carrier's long distance service from any phone at any time.<sup>13/</sup> Requiring Air-Ground licensees to subscribe to an "800" or "950" number for this purpose would be wasteful since it is not technologically possible for a caller to access any Air-Ground service from any location other than an aircraft. Even then, the caller technologically may access the service of the Air-Ground licensee the caller desires only if he or she is on an aircraft equipped with that particular licensee's service.

The cost necessary to comply with another TOCSIA provision also is unwarranted because In-Flight already accomplishes the objective this provision seeks to achieve. Specifically, TOCSIA Section 226(b)(1)(A) would require an Air-Ground licensee to

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<sup>12/</sup> See Section 226(e)(1)(B) of the Act.

<sup>13/</sup> See Report and Order in CC Dkt. No. 91-35, 6 FCC Rcd. 4736, 4744 (1991) recon. denied, 7 FCC Rcd. 4355, 4365 (1992).

identify itself audibly twice during each call by an airline passenger using its service. This requirement is designed to "allow the consumer 'to make a free and knowledgeable choice among . . . [long distance carriers] and help avoid or resolve disputes over charges'".<sup>14/</sup> It plainly is wasteful to require that In-Flight install audio equipment to accomplish this purpose since In-Flight visually identifies itself as the service provider on the video screen directly in front of each passenger and on the card in each seatback pocket as explained above.

Applying TOCSIA to the Air-Ground industry also would impose a significant cost on the FCC. For example, TOCSIA requires service providers to charge each caller an identical price for access to the terrestrial telephone network regardless of whether the caller uses the long distance carrier selected by the service provider or the long distance carrier selected by the caller.<sup>15/</sup> In view of this requirement, a major regulatory controversy could develop at the FCC over the Air-Ground industry's pricing of access to the terrestrial long distance network. For example, GTE has indicated that it might charge callers substantially more than 90 percent of its end-to-end calling rate for access to the terrestrial long distance network.<sup>16/</sup> However, a terrestrial long

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<sup>14/</sup> Report and Order in CC Dkt. No. 90-313, 6 FCC Rcd. 2744, 2756 (1991) (quoting from Notice of Proposed Rulemaking in CC Dkt. No. 90-313, 5 FCC Rcd. 4630, 4632 (1990)).

<sup>15/</sup> See Section 226(c)(1)(C).

<sup>16/</sup> See GTE's "Petition for Reconsideration or Waiver" at 11-12 (MSD-92-14, Sept. 27, 1993). This petition is still pending before the Commission as explained in note 1 above.

distance carrier theoretically could challenge this pricing as an unfair attempt by GTE to discourage airline passengers from accessing the carrier of the passenger's choice, and the FCC would be forced into initiating a massive regulatory proceeding in order to determine the appropriate pricing for access to terrestrial long distance facilities via Air-Ground networks.

II. There Is No Rational Reason to Require that Air-Ground Licensees Comply with Tariffing and Facilities Authorization Requirements In Connection with Providing International Communications Service

The Commission also should exempt Air-Ground licensees under the criteria established in Section 332(c) from the tariffing and facilities authorization requirements applicable to the provision of international service.

Compliance with the tariffing and facilities authorization requirements is unnecessary to guarantee reasonable "charges, practices, classifications or regulations" for international service or for the "protection of consumers" for three reasons. First, all Air-Ground licensees have been classified as "non-dominant carriers," a regulatory classification defining those carriers which lack the ability to engage in predatory conduct that hurts consumers.<sup>17/</sup> Second, Air-Ground licensees provide international service by reselling the switched international service of existing U.S. terrestrial carriers, which is the kind of international service that presents the least need for regulatory

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<sup>17/</sup> Report and Order in Gen. Dkt. No. 88-96, supra, 5 FCC Rcd. at 3865.



oversight even when it is offered by dominant carriers.<sup>18/</sup> Finally, only a small percentage of calls via Air-Ground networks are international. For example, ~~substantial~~ fewer than ~~one~~ *one* percent of calls are international on aircraft subscribing to In-Flight's service.

Exempting Air-Ground licensees from mandatory compliance with tariffing and facilities authorization requirements in connection with providing international service also is "consistent with the public interest" because the costs of compliance plainly outweigh the benefits. While the benefits of forcing compliance are speculative at best for reasons described above, the costs are real. The Commission's decision in the Second Report and Order in Dkt. No. 93-252 to relieve all CMRS providers from these requirements with respect to interstate services effectively relieved many types of CMRS providers from all costs that the Commission identified since many CMRS providers do not provide international service.<sup>19/</sup> By contrast, all Air-Ground licensees provide international service. As a result, the costs identified by the Commission in complying with tariffing and facilities authorization requirements will still apply to Air-Ground licensees unless the agency forebears from enforcing them for the provision of international service.

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<sup>18/</sup> See, e.g., Regulation of Int'l. Common Carrier Services, 7 FCC Rcd. 7331, 7335 (1992).

<sup>19/</sup> 9 FCC Rcd. at 1479 (identifying numerous specific costs resulting from these regulatory requirements).

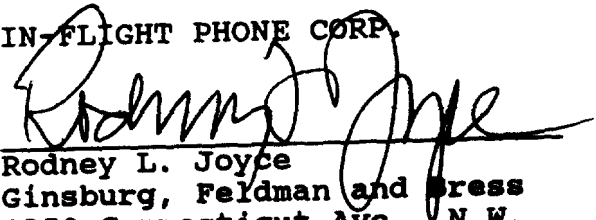
CONCLUSION

The Commission should forbear from requiring 800 MHz Air-Ground licensees to comply with TOCSIA. It also should forebear from requiring licensees in this Service to comply with tariffing and facilities authorization requirements in connection with the provision of international communications service.

Respectfully submitted,

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